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Supreme Court, U.S.  
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In the  
Supreme Court of the United States

OCTOBER TERM, 1988

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ARTHUR J. BLANCHARD,  
Petitioner,

VERSUS

JAMES BERGERON, *et al.*,  
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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BRIEF IN SUPPORT OF PETITIONER FOR AMICI  
CURIAE ADVOCACY CENTER FOR ELDERLY AND  
DISABLED, APPELLATE ADVOCACY PROGRAM,  
BLS LEGAL SERVICES, CORP., INSTITUTE FOR  
PUBLIC REPRESENTATION, LOUISIANA TRIAL  
LAWYERS ASSOCIATION, JAMES GREEN, JAMES  
KELLOGG, AND GERALD LOPEZ

---

M. DAVID GELFAND\*  
TERRY E. ALLBRITTON  
Appellate Advocacy Program  
Tulane Law School  
6801 Freret Street  
New Orleans, LA 70118  
(504) 865-5995  
Counsel for Amici Curiae

\* Counsel of Record

## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	iii
Interest of Amici.....	1
Summary of Argument.....	3
Argument.....	7
I. TREATING A CONTINGENCY FEE CONTRACT AS AN AUTOMATIC CAP IN CIVIL RIGHTS LITIGATION IS CONTRARY TO CONGRESSIONAL INTENT, INCONSISTENT WITH DECISIONS OF THIS AND OTHER COURTS, AND AGAINST PUBLIC POLICY.....	7
A. The Decision Below is Contrary to the Congressional Intent and Purposes Behind the Civil Rights Attorney's Fees Awards Act and the Civil Rights Acts.....	7
B. The Decision Below is Inconsistent with the Decisions of this Court and is Totally Contrary to Rulings of the Other Courts of Appeals.....	12

C. Applying the Approach of the Court Below to the Award of Attorney's Fees Would Have Severe Detrimental Consequences.....	20
---	----

II. FEES FOR LAW STUDENTS, LAW CLERKS, AND PARALEGALS ARE APPROPRIATE, DESIRABLE, AND NECESSARY IN CIVIL RIGHTS ACTIONS.....	28
---	----

A. This Issue, Raised Only Ambiguously By the Court of Appeals, Should Not Form the Basis for Action By This Court.....	28
---	----

B. The Award of Fees for Legal Support Personnel is in Accordance with Legislative History and Well-Established Caselaw under § 1988 and Other Fee Shifting Provisions.....	35
--	----

C. Separate Billing for Legal Support Personnel Keeps the Level of Fee Awards Reasonable, and is Especially Necessary in Civil Rights Litigation.....	39
---	----

Conclusion.....	48
-----------------	----

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Abrams v. Baylor College of Medicine, 805 F.2d 523 (5th Cir.1986).....	38
Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir. 1982).....	33
Blanchard v. Bergeron, 831 F.2d 563 (5th Cir.1987).....	16,18, 28
Blum v. Stenson, 465 U.S. 886 (1984).....	21,25, 47
Bogosian v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985).....	31
Brantley v. Surles, 804 F.2d 321 (5th Cir. 1986).....	13
City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).....	30
City of Riverside v. Rivera, 477 U.S. 561 (1986).....	10,11, <u>passim</u>

City of Springfield v. Kibbe, 107 S.Ct. 1114 (1987).....	34
Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc., 835 F.2d 541 (5th Cir. 1987).....	30,33
Cooper v. Singer, 719 F.2d 1496 (10th Cir 1983).....	13,17, 26,27
Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).....	42
Copper Liquor, Inc. v. Adolf Coors Co., 624 F.2d 575 (5th Cir. 1980).....	13
Dependahl v. Falstaff Brewing Corp., 496 F. Supp. 215 (E.D. Mo. 1980), <u>aff'd</u> , 653 F.2d 1208 (8th Cir.), <u>cert. denied</u> , 454 U.S.968(1981).....	31
DiGennaro v. Bowen, 666 F. Supp. 426 (E.D.N.Y. 1987).....	46
Evans v. Jeff D., 475 U.S. 717 (1986).....	24
Fleet Inv. Co. v. Rogers, 620 F.2d 792 (10th Cir. 1980).....	12

Garmong v. Montgomery County, 668 F. Supp. 1000 (S.D. Tex 1987)....	45
Hamner v. Rios, 769 F.2d 1404 (9th Cir. 1985).....	19,24
Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), <u>cert. denied</u> , 472 U.S. 1027 (1985)...	32
Henry v. Webermeier, 738 F.2d 188 (7th Cir. 1984).....	30,39
Hensley v. Eckerhart, 461 U.S. 424 (1983).....	25,42
Jacobs v. Mancuso, 825 F.2d 559 (1st Cir. 1987).....	30,41
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)...	16,17, 40,41
Jones v. Armstrong Cork Co., 630 F.2d 324 (5th Cir. 1980).....	33
Jordan v. United States Dep't of Justice, 691 F.2d 514 (D.C. Cir. 1982).....	31,32, 46

Keith v. Volpe, 833 F.2d 850 (9th Cir. 1987).....	31
Kerr v. Quinn, 692 F.2d 875 (2d Cir. 1982).....	25
Lamphere v. Brown University, 610 F.2d 46 (1st Cir. 1979).....	38
Lewis v. Coughlin, 801 F.2d 570 (2d Cir. 1986).....	13
Louisiana v. Mississippi, 466 U.S. 921 (1984).....	36
Marek v. Chesny, 473 U.S. 1 .....	24,32
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).....	32
Northcross v. Bd. of Educ. of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), <u>cert. denied</u> , 447 U.S. 911 (1980).....	30

Paul v. Davis, 424 U.S. 693 (1976).....	22
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S.Ct. 3078 (1987).....	18,32, 34
Pharr v. Hous. Auth., 704 F.2d 1216 (11th Cir. 1983).....	18,19
Quesada v. Thomason, 850 F.2d 537 (9th Cir. 1988).....	11,12, <u>passim</u>
Richardson v. Byrd, 709 F.2d 1016 (5th Cir.), <u>cert.</u> <u>denied</u> , 464 U.S. 1009 (1983).....	33
Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983).....	31,36
Roe v. City of Chicago, 586 F. Supp. 513 (N.D. Ill. 1984)....	38
Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978).....	13
Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988).....	23

Sisco v. J.S. Alberici Constr. Co.,  
733 F.2d 55 (8th Cir. 1984)..... 11,13

South Carolina v. Baker,  
108 S. Ct. 279 (1987)..... 36

Sullivan v. Crown Paper Bd. Co.,  
719 F.2d 667 (3d Cir. 1983)..... 12,17,  
26

Tucker v. Phyfer,  
819 F.2d 1030 (11th Cir. 1987)..... 19

Ursic v. Bethlehem Mines,  
719 F.2d 670 (3d Cir. 1983)..... 42

Vaughns v. Bd. of Educ. of Prince  
George's County, 770 F.2d 1244  
(4th Cir. 1985)..... 30

Walters v. Atlanta,  
803 F.2d 1135 (11th Cir. 1986)..... 19,31

<u>Statutes</u>	<u>Page</u>
42 U.S.C. § 1983 (1982).....	7
42 U.S.C. § 1988 (1982).....	1,5, <u>passim</u>

## Other

## Page

Senate Report No. 94-1011, reprinted  
in 1976 U.S. CODE CONG. & ADMIN.  
NEWS 5908..... 8,9,  
36,44

S. Nahmod, Civil Rights and Civil  
Liberties Litigation (2d ed. 1986 &  
Supp. 1987)..... 16

## INTEREST OF AMICI

The Advocacy Center for the Elderly and the Disabled is a nonprofit legal organization that provides legal services to disabled individuals throughout Louisiana. The Center regularly seeks attorney's fee awards in cases under § 504 of the Rehabilitation Act and under the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142. The Appellate Advocacy Program is a clinical program of Tulane Law School. The Program will regularly seek court awarded attorney's fees for appellate work performed by its faculty and enrolled students. The BLS Legal Services Corp. is a corporate entity under which Brooklyn Law School's clinical programs operate. The

Corporation has regularly sought and received court-awarded fees for work performed by students enrolled in the Law School's clinical programs. The Institute for Public Representation is a clinical program at the Georgetown University Law Center. The Institute has sought and received court-awarded attorney's fees for work performed in civil rights and Freedom of Information Act litigation by its staff attorneys and law students enrolled in its clinical program.

James Green, James Kellogg, and Gerald Lopez are attorneys who regularly represent civil rights and civil liberties clients in federal courts in Louisiana, Florida, New York, California, and other parts of the Nation.

#### SUMMARY OF ARGUMENT

I. The Fifth Circuit panel's use of a contingency fee agreement as an automatic upper cap on the fees awarded under § 1988 is contrary to Congressional intent, inconsistent with the decision of this and other Courts, and would have severe negative repercussions.

Many civil rights cases address violations of constitutional rights which are non-pecuniary in nature and which do not produce large damages awards. Limiting plaintiffs' recovery of attorney's fees to a percentage of these small awards would make it difficult for many citizens to vindicate their civil rights.

This Court has rejected the argument

that statutory fee awards should be modeled after contingency fee agreements. Likewise, the great weight of authority among the Courts of Appeals, including the Fifth Circuit, discounts the use of contingency fee agreements in awarding statutory fees.

Imposition of an automatic contingency fee cap would be unfair to plaintiffs, by allowing defendants' attorneys to litigate tenaciously over small damages awards, while plaintiffs' attorney's fees would be limited to a percentage of those damages awards. The cap would also represent a windfall, not intended by Congress, to defendants in those cases most likely to result in a monetary award to plaintiffs. The fee cap would also force the parties to focus too heavily upon increasing the

size of damages awards, rather than upon obtaining the most effective declaratory or injunctive relief.

II. The panel below also was incorrect in suggesting that it could not award separate compensation for paralegals and law clerks. This Court should not base a decision with potentially broad implications upon the panel's ambiguous statement.

This Court and ten of the Courts of Appeals have approved separate compensation for legal support personnel and the Congressional intent behind § 1988 is clear. Under § 1988, civil rights plaintiffs are to be treated the same as the fee-paying clients of traditional law firms conducting complex federal litigation.

Separate compensation for legal

support personnel, at an hourly rate lower than that appropriate for members of the bar, is a traditional practice which keeps down the cost of legal representation. Separate compensation is especially necessary in enforcing civil rights. To conduct this important litigation, law firms, public interest organizations, and law school clinical education programs often must rely heavily on legal support personnel. Separate compensation for legal support personnel should therefore be upheld for civil rights plaintiffs.

## ARGUMENT

### I. TREATING A CONTINGENCY FEE CONTRACT AS AN AUTOMATIC CAP IN CIVIL RIGHTS LITIGATION IS CONTRARY TO CONGRESSIONAL INTENT, INCONSISTENT WITH DECISIONS OF THIS AND OTHER COURTS, AND AGAINST PUBLIC POLICY.

#### A. The Decision Below is Contrary to the Congressional Intent and Purposes Behind the Civil Rights Attorney's Fees Awards Act and the Civil Rights Acts.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that "[i]n any action or proceeding to enforce [various civil rights acts, including 42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988.

Fee shifting provisions have been utilized repeatedly by Congress, in recognition that "private attorneys

general" must undertake much of the enforcement of the underlying laws. See Report of the Senate Judiciary Committee, S.Rep. No 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5912 [hereinafter "Senate Report"]. It is clear that Congress intended a direct linkage between the enforcement of civil rights laws and the availability of fee awards: "fee awards are an integral part of the remedies necessary to obtain [full] compliance" with civil rights laws. Id. at 5 (emphasis added).

Statutory fee shifting is especially necessary for the enforcement of civil rights laws.

If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover

what it cost them to vindicate these rights in court.

Id. at 2. Fee shifting is essential to achieving the goals of the Reconstruction Era civil rights acts: compensating the victims of civil rights violations; requiring violators of constitutional rights to pay for their violations; and deterring subsequent unconstitutional acts. "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting." Senate Report, p.6.

The instant case involves individual police misconduct, for which the jury awarded compensatory and punitive damages. This is precisely the situation in which this Court has

found the imposition of damages, including attorney's fees, to be the appropriate remedy. "[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future. . . . This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable." City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) (citation omitted).

Many civil rights cases, however, do not produce large damages awards. Many result in only injunctive or declaratory relief or nominal damages. Hence, this Court has explicitly rejected any rule of proportionality (between the relief obtained and the fees awarded) because such a rule "would make it difficult, if

not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts . . . . Congress determined that it would be necessary to compensate lawyers for all time reasonably expended." Rivera, 477 U.S. at 578 (relying upon House Report, Senate Report, and Senate remarks on § 1988).

Not surprisingly, therefore, the Courts of Appeals have determined that treating a contingency fee contract as a ceiling on statutory attorney's fee awards "would run counter to the intention of Congress to encourage successful civil rights litigation." Sisco v. J.S. Alberici Constr. Co., 733 F.2d 55, 57 (8th Cir. 1984). Accord Quesada v. Thomason, 850 F.2d 537,

540-41 (9th Cir. 1988) (specifically rejecting the Fifth Circuit's approach in the instant case). See also Fleet Inv. Co. v. Rogers, 620 F.2d 792, 793 (10th Cir. 1980) (fees in odometer rollback case); Sullivan v. Crown Paper Bd. Co., 719 F.2d 667, 669 (3d Cir. 1983) (age discrimination in employment case, relying upon legislative intent behind § 1988).

B. The Decision Below is Inconsistent with the Decisions of This Court and is Totally Contrary to Rulings of the Other Courts of Appeals.

As elaborated in Petitioner's Brief, the other Courts of Appeals have rejected the approach taken by the Fifth Circuit panel in the instant case. See, e.g., Quesada, 850 F.2d at 541 ("We

conclude that the purposes of section 1988, recent Supreme Court cases, and our own precedents do not support this understanding.") (footnote omitted); Lewis v. Coughlin, 801 F.2d 570, 575 (2d Cir. 1986); Sisco, 733 F.2d at 56-57; Cooper v. Singer, 719 F.2d 1496, 1503 (10th Cir. 1983) (en banc); Sargeant v. Sharp, 579 F.2d 645, 649 (1st Cir. 1978).<sup>1</sup>

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1. Even other Fifth Circuit panels appear to differ with the panel in the instant case. See, e.g., Brantley v. Surles, 804 F.2d 321, 326-27 (5th Cir. 1986); Copper Liquor, Inc. v. Adolf Coors Co., 624 F.2d 575, 583 n.14 (5th Cir. 1980).

Imposition of an automatic cap on attorney's fees based upon a contingency fee arrangement also is inconsistent with this Court's decision in City of Riverside v. Rivera, 477 U.S. 561 (1986). There, this Court roundly rejected the argument advanced by petitioners and the Solicitor General "that fee awards in damages cases should be modeled upon the contingent fee arrangements commonly used in personal injury litigation." Id. at 573.

Justice Brennan's opinion for a plurality of 4 members of the current Court demonstrated that such an approach "would seriously undermine Congress' purpose in enacting § 1988," id. at 576, because such contingency fee arrangements "would often not encourage lawyers to accept civil rights cases,

which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." Id. at 577. Justice Powell agreed:

It is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases. I therefore find petitioners' asserted analogy to personal injury claims unpersuasive in this context.

Id. at 586 (Powell, J., concurring in judgment). Though insisting upon reasonableness in fee awards, even the dissent in Rivera announced: "I agree with the plurality that the importation of the contingent-fee model to govern fee awards under § 1988 is not warranted by the terms and legislative history of the statute." Id. at 595 (Rehnquist, J., dissenting). See generally S.

Nahmod, Civil Rights and Civil Liberties Litigation § 1:25 (2d ed. 1986 & Supp. 1987).

The court below sought support for its novel approach by quoting one sentence of dictum from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974). See Blanchard v. Bergeron, 831 F.2d 563, 564 (5th Cir. 1987). The court below plucked, out of context, a portion of the discussion of one single factor (of the 12 analyzed by Johnson). That court then applied that sentence in a wooden fashion to foreclose any statutory award above the contingency agreement level. Yet, the remainder of the Johnson opinion, the legislative history of the subsequent Attorney's Fees Awards Act, and recent judicial decisions all repeatedly stress

flexibility in determining the reasonableness of the fee award. Hence, it is not surprising that the Fifth Circuit panel's overly strict, "one dimensional" approach has been specifically rejected by other courts. See, e.g., Cooper, 719 F.2d at 1500-03; Sullivan, 719 F.2d at 669.

Even if the dictum from Johnson were now considered persuasive, it could, at most, suggest treating a contingency agreement as but one among several relevant factors (as the district court in this case did, see Pet. for Cert. at 13A), rather than as an automatic, absolute cap on attorney's fees (as the Fifth Circuit panel did). See, e.g., Rivera, 477 U.S. at 574; Sullivan, 719 F.2d at 669 ("At its clearest, the legislative mandate would therefore have

courts consider the existence of a contingency arrangement, while not allowing such consideration to thwart the enforcement of the substantive statutory rights that gave rise to the fee award provision."). As Justice White recently wrote for a plurality this Court: "At most, therefore, Johnson suggests that the nature of the fee contract between the client and his attorney should be taken into account when determining the reasonableness of a fee award. . . ." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S.Ct. 3078, 3085 (1987).

The court below also cited Pharr v. Hous. Auth., 704 F.2d 1216 (11th Cir. 1983), as support for its novel approach. See Blanchard, 831 F.2d at 564. However, in Pharr, the Eleventh

Circuit actually used the attorney-client contract as a basis for increasing the fee award. See Pharr, 704 F.2d at 1218. See also Hamner v. Rios, 769 F.2d 1404, 1409 (9th Cir. 1985) (so interpreting Pharr). Furthermore, the Eleventh Circuit subsequently refused to allow the determination of a reasonable statutory fee to be governed solely by contingency contracts. See Walters v. Atlanta, 803 F.2d 1135, 1152-53 (11th Cir. 1986). The court there felt that separate calculation of the statutory fee award more accurately reflected this Court's rulings. See generally Tucker v. Phyfer, 819 F.2d 1030, 1035-36 n.7 (11th Cir. 1987).

C. Applying the Approach of the Court Below to the Award of Attorney's Fees Would Have Severe Detrimental Consequences.

In addition to the negative implications for each of the Congressional purposes discussed in Part IA, above, adoption of the Fifth Circuit panel's approach would be severely unfair to the parties involved in civil rights litigation.

Salaried public interest litigators, working for such organizations as the American Civil Liberties Union, Pacific Legal Foundation, Mountain States Legal Foundation, law school clinics, or Legal Services Corporations often do not charge their clients any fees at all. Yet, this Court and lower courts have repeatedly, and correctly, ruled that such nonprofit legal services

organizations are nonetheless entitled to statutory fees, calculated by the usual method (lodestar plus multiplier, where appropriate). See, e.g., Blum v. Stenson, 465 U.S. 886, 896-97 (1984). See also pp. 47-48 of this Brief, below. The courts have repeatedly rejected any suggestion that a contract in which the client is not charged for the legal representation can serve as an absolute ceiling for fees. Likewise, a contingency fee agreement should not be utilized as the court below did, i.e. to award less than the "reasonable" fee allowed by § 1988. See generally Quesada, 850 F.2d at 542-43.

Contingency fee agreements may be entered into for reasons unrelated to the anticipated size of a damages award. A plaintiff may have a state law tort

claim pendent to a civil rights claim; such tied claims are common in cases involving individual police misconduct, like the instant case. In these cases, a contingency agreement could be more appropriate for the tort claim, as there probably would be no state fee shifting provision. The plaintiff could lose on the civil rights claim, but prevail on the state tort claim. See Paul v.

Davis, 424 U.S. 693, 699-701 (1976).

The contingency fee agreement covering the tort claim would provide the only vehicle for the impecunious plaintiff to pay his or her legal costs.

Furthermore, the client and attorney could well intend that the contingency agreement govern only the tort claim. They would then rely on § 1988 to govern the civil rights claim. See Quesada,

850 F.2d at 542 ("The attorney signs the [contingency] agreement knowing that statutory attorneys' fees will be available.") This acknowledgment that § 1988 applies to the civil rights claim would in no way be contrary to the Congressional goal of enforcing the civil rights laws. Indeed, such a bifurcated arrangement as to fees would keep down the cost of private civil rights enforcement, and would not produce a windfall to plaintiffs.

If the approach of the panel below were adopted, the result would be illogical and unfair. The Fifth Circuit has ruled that the fee contract is not binding upon the trial court, or defendants, if it involves more than a "reasonable fee." See Sellers v. Delgado Community College, 839 F.2d

1132, 1141 (5th Cir. 1988). See also Hamner, 769 F.2d at 1407-10. Further, under decisions of this Court, the contract would be abrogated, in whole or in part, if plaintiffs have rejected a Rule 68 settlement offer prior to a trial which produces less relief, see Marek v. Chesny, 473 U.S. 1 (1984), or if defendants have made an offer requiring a fee waiver. See Evans v. Jeff D., 475 U.S. 717 (1986). If the decision in the instant case were allowed to stand, a contingency fee agreement would be controlling in civil rights litigation in but a single situation. The contract could be used to limit attorney's fees only when plaintiffs prevail with a small damages award. Yet, this is precisely the situation where statutory fees have been

deemed most appropriate. See Rivera, 477 U.S. at 577; id. at 585-86 (Powell, J., concurring); Kerr v. Quinn, 692 F.2d 875, 877 (2d Cir. 1982); Senate Report, pp. 2, 5, 6.

The court below is incorrect in believing that its decision is necessary to prevent a windfall to plaintiff. First, any possible windfall would be prevented by a district court's calculation of "a reasonable attorney's fee" under the standards articulated by this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), Blum, Rivera, and other cases. These standards permit only the award of fees which accurately reflect the fair value of legal services on successful claims.

Second, any perceived danger of double recovery by plaintiff's attorney

can be avoided by the procedure and judicial orders employed by the Third Circuit and other Courts of Appeals in similar contingency contract cases. See Cooper v. Singer, 719 F.2d 1496, 1504, 1506-07 (10th Cir. 1983) (en banc); Sullivan v. Crown Paper Bd. Co., 719 F.2d 667, 669-70 (3d Cir. 1983). Indeed, the unique approach imposed by the court below actually gives a windfall to defendants (who have violated plaintiff's constitutional rights), based upon nothing more than the mere fortuity of the particular arrangement, between plaintiff and his or her attorney, to which the defendant is not a party. See Quesada, 850 F.2d at 543; Sullivan, 719 F.2d at 669 ("Such a result would also frustrate the legislative policy objective that the

fee itself serve as a disincentive to future discriminatory conduct.")

Third, it would also be severely unfair for defendants' lawyers, who are usually paid on a non-contingent basis, to litigate tenaciously on the merits of the constitutional claims and on the fee award issues, anticipating that plaintiff's attorney could not obtain any more than a specified proportion of a small damages award. See Rivera, 477 U.S. at 580-81 n.11.

Finally, the approach of the court below would force the parties in civil rights cases to focus upon increasing the size of damages awards, rather than upon obtaining the most effective declaratory or injunctive relief. See Quesada, 850 F.2d at 542; Cooper, 719 F.2d at 1503.

II. FEES FOR LAW STUDENTS, LAW CLERKS,  
AND PARALEGALS ARE APPROPRIATE,  
DESIRABLE, AND NECESSARY IN CIVIL  
RIGHTS ACTIONS.

- A. This Issue, Raised Only  
Ambiguously By the Court of  
Appeals, Should Not Form the  
Basis for Action By This Court.

After holding that a contingency  
fee arrangement constituted an automatic  
cap on the statutory award of attorney's  
fees under § 1988, see Part I above, the  
panel below compounded its error by  
disallowing any award for legal support  
personnel -- law students, law clerks,  
and paralegals. The panel stated:  
"Moreover, any hours 'billed' by law  
clerks or paralegals would also  
naturally be included within the  
contingency fee." Blanchard v.  
Bergeron, 831 F.2d 563, 564 (5th Cir.  
1987). The panel offered no support for

this ambiguous statement.

The issue of separate compensation  
for legal support personnel was not  
briefed below; the Record regarding it  
is scant at best. It is unclear what  
result the panel below would have  
reached had there been no contingency  
fee agreement in effect. As a result,  
this issue has not been given any  
independent consideration apart from its  
entanglement with the contingency fee  
issue.

Amici respectfully submit that  
this Court should not speculate on the  
meaning of the Court of Appeals'  
language, particularly since this issue  
comes before this Court in such an usual  
posture. This Court should not  
necessarily assume that the Fifth  
Circuit has adopted a position which

apparently diverges radically from the overwhelming weight of the caselaw. This Court and at least ten Courts of Appeals, including the Fifth Circuit, have allowed separate compensation for legal support personnel. See, e.g., City of Riverside v. Rivera, 477 U.S. 561, 565, 581 (1986); Jacobs v. Mancuso, 825 F.2d 559, 563 (1st Cir. 1987); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Vaughns v. Bd. of Educ. of Prince George's County, 770 F.2d 1244, 1245 (4th Cir. 1985); Concorde Limousines, Inc. v. Maloney Coachbuilders, Inc., 835 F.2d 541, 547 n.25 (5th Cir. 1987); Northcross v. Bd. of Educ. of Memphis City Schools, 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Henry v. Webermeier, 738 F.2d 188, 192 (7th Cir.

1984); Dependahl v. Falstaff Brewing Corp., 496 F. Supp 215 (E.D. Mo. 1980), aff'd, 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981); Keith v. Volpe, 833 F.2d 850, 859, 860 (9th Cir. 1987); Walters v. City of Atlanta, 803 F.2d 1135, 1151 (11th Cir. 1986); Jordan v. United States Dep't of Justice, 691 F.2d 514, 522-23 (D.C. Cir. 1982). See also Bogosian v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985). Cf. Ramos v. Lamm, 713 F.2d 546, 558 (10th Cir. 1983) (separately compensable only if not included in attorney's hourly rate).

This Court should not reach out to address this issue in a case with such a scant Record and in such an ambiguous posture. Disposition by this Court of the instant § 1988 case would have a

very broad impact. The caselaw on fee shifting provisions has developed by courts liberally borrowing theories and rules of recovery from one fee shifting provision to apply to other, similar provisions. See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S.Ct. 3078 (1987) (Clean Air Act); Malek v. Chesny, 473 U.S. 1, 14, 43 (1985) (Brennan, J., dissenting) (collecting over 100 fee shifting provisions); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980) (comparing Title VII to § 1988); Heiar v. Crawford County, 746 F.2d 1190, 1203 (7th Cir. 1984) ("age discrimination cases commonly cite section 1988 cases on fee questions"); Jordan, 691 F.2d 514 (Freedom of Information Act). Any action in this

area of the law by this Court should be founded on more than an ambiguous statement by a panel aberrational even from its own Circuit's prior holdings.<sup>2</sup>

Whether or not this Court upholds the panel's decision that contingency fee agreements do serve as an automatic cap on statutory fees, the issue of fees for legal support personnel would not be affected. If this Court were to affirm the panel below on the contingency fee

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2. See, e.g., Richardson v. Byrd, 709 F.2d 1016, 1023 (5th Cir.), cert. denied, 464 U.S. 1009 (1983); Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982) ("paralegal expenses are not 'costs' within the meaning of Rule 54(d) [but] are separately recoverable only as part of a prevailing party's award for attorney's fees"); Jones v. Armstrong Cork Co., 630 F.2d 324, 325 n.1 (5th Cir. 1980). See also Concorde Limousines, 835 F.2d at 547 n.25 (Wisdom, J.).

agreement issue, there would be no need to address the issue of separate compensation for legal support personnel. If the Court reverses the decision below, Amici respectfully urge that the case be remanded to the Court of Appeals for the Fifth Circuit so that a concrete Record may be developed on this and other issues. Cf. Delaware Valley Citizens' Council, 107 S.Ct. at 3089-91 (O'Connor, J., concurring in the judgment) (district court must examine relevant legal market in awarding fees). Postponement of adjudication of this issue until properly developed would be entirely consistent with the prudential concerns repeatedly expressed by this Court. See City of Springfield v. Kibbe, 107 S.Ct. 1114, 1116 (1987) (dismissing writ of certiorari as

improvidently granted); City of Riverside v. Rivera, 477 U.S. 561, 581 (1986) (Powell, J., concurring).

B. The Award of Fees for Legal Support Personnel is in Accordance with Legislative History and Well-Established Caselaw Under § 1988 and Other Fee Shifting Provisions.

If this Court decides to rule on the issue of separate compensation for legal support personnel, Amici respectfully suggest that there can be but one conclusion -- that separate compensation is necessary to meet the goals of § 1988 and the underlying civil rights laws.

The Report of the Senate Judiciary Committee which accompanied the passage of the Civil Rights Attorney's Fees Awards Act of 1976 stated plainly: "In

computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'."

Senate Report, p.6 (citation omitted).

Separate compensation for non-lawyers who have some legal training (e.g. paralegals, law clerks, law students) is an "increasingly widespread custom" in the legal community.

Ramos v. Lamm, 713 F.2d 546, 558-59 (10th Cir. 1983).<sup>3</sup> For example, it is

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3. This Court has recognized that custom in its exercise of original jurisdiction, by awarding such separate compensation for support personnel to its Special Masters. See, e.g., South Carolina v. Baker, 108 S. Ct. 279 (1987). See also Louisiana v. Mississippi, 466 U.S. 921 (1984) (Burger, C.J., dissenting). well-known that private law firms hire

law students as summer associates. The time spent on a legal matter by these "associates" is, of course, billed to the firm's fee-paying clients.

Increasingly, law students also are employed and their time billed, during the academic year, by private law firms of all sizes. Both practices serve the legal profession's need for an apprenticeship program.

As noted by Petitioner, many courts have either explicitly addressed the desirability of separate billing or have, by awarding such fees, implicitly endorsed them. See Brief for Petitioner 16-17, 19. In those few civil rights cases where fees for legal support personnel have been denied, the courts have not found such awards to be

per se unreasonable. Rather, the courts have determined that other factors militated against such an award in particular cases.<sup>4</sup>

Indeed, even the rationale of the few cases that disallow support personnel fees -- that those fees are built into the particular attorney's high hourly billing rate -- has been

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4. See, e.g., Abrams v. Baylor College of Medicine, 805 F.2d 528, 535 (5th Cir. 1986) ("the cost of the services of support personnel -- such as paralegals -- was encompassed within the relatively high hourly billing rate awarded for the time of the plaintiffs' attorneys"); Lamphere v. Brown University, 610 F.2d 46, 48 (1st Cir. 1979) (denying additional fees to attorneys beyond what paralegals had already received from attorneys as payment in the case); Roe v. City of Chicago, 586 F. Supp. 513 (N.D. Ill. 1984) (included in attorney's billing rates).

criticized:

It is impossible to believe that Congress would have wanted prevailing parties to get back their lawyers' . . . expenses . . . which are included in overhead and therefore billed as part of the lawyer's hourly rate . . . but not the expenses . . . often billed separately to the client.

Henry v. Webermeier, 738 F.2d 188, 192 (7th Cir. 1984) (Posner, J.).

- C. Separate Billing for Legal Support Personnel Keeps the Level of Fee Awards Reasonable, and is Especially Necessary in Civil Rights Litigation.

As noted above, separate compensation for legal support personnel is widespread throughout the legal profession. Much of the work involved in providing effective legal representation can be, and is, performed not by lawyers but by personnel with specialized legal training: law students

in clinical education programs; law clerks, in both legal service organizations and private law firms; and paralegals, who do time-consuming, but vital, legal research, investigation, and factual development. Separate billing is a responsible billing practice which keeps down the costs of legal representation, both for the traditional fee-paying client and for clients who hope to utilize fee shifting provisions in pursuing their claims.

The Fifth Circuit itself has specifically addressed the issue of separate compensation for legal support personnel, in the very case on which the panel below relied -- Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The Fifth Circuit stated:

It is appropriate to distinguish between legal work, in the strict

sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate.

Id. at 717 (emphasis added). Johnson recognized (as have many other cases since) that litigation involves many tasks which need not be performed by an attorney, but which nevertheless must be performed. These tasks, of course, are to be compensated at lesser rates, as Johnson suggests, and as other cases have required. This separate compensation, however, does constitute "fees" within the meaning of § 1988. The use of support personnel "is to be encouraged by separate compensation in order to reduce the time of more expensive counsel." Jacobs v. Mancuso,

825 F.2d 559, 563 (1st Cir. 1987). See also Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983).

This Court has cautioned with respect to fee shifting provisions: "'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'" Hensley v. Eckerhart, 461 U.S. 424, 434 (1983), quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original). See also City of Riverside v. Rivera, 477 U.S. 561, 591 (1986) (Rehnquist, J., dissenting) (statutory fees must be determined according to "the traditional

billing practices in the profession [and as] a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys").

Separate compensation for legal support personnel is a "traditional billing practice," and is regularly utilized by private law firms with their fee-paying clients. This reasonable practice helps reduce the cost of legal representation for all concerned, including defendants who must pay under statutory fee shifting provisions, including § 1988. Congress plainly intended that civil rights plaintiffs utilize the private bar (with its normal billing practices). Fee shifting provisions enable "vigorous enforcement of modern civil rights legislation, while at the same time limiting the

growth of the enforcement bureaucracy." Senate Report, p.4.

Civil rights cases often are quite complicated. The Senate Judiciary Committee compared civil rights actions to "other types of equally complex Federal litigation, such as antitrust." Senate Report, p. 6. Separate compensation in such complex litigation is an exercise of sound billing judgment which reduces the overall cost of effective legal representation. It serves the mandates of § 1988 and of this Court extremely well.

Furthermore, the use of legal support personnel is, in many instances, necessary, for the continuing existence of nonprofit legal assistance or legal defense organizations. Public interest groups, nonprofit law firms, and legal

services organizations, with their lower salary scales for attorneys, too often are understaffed. Caseloads often are extremely high. The use of attorneys to perform paralegal or clerking tasks is a poor use of limited professional time. "The employment of [support personnel] therefore serve[s] an economically efficient purpose, allowing counsel more time to pursue traditional strict legal work." Garmong v. Montgomery County, 668 F. Supp. 1000, 1011 (S.D. Tex. 1987). Legal support personnel are fundamental if those entities are to continue their important work.

The clinical education programs at the Nation's law schools, by definition, also require the use of other non-lawyers -- law students. There are dozens of clinical education programs

utilizing (and teaching) law students in actual litigation. The monies generated by statutory fees often are essential to the provision of clinical training and to the continued development of the civil rights bar. Fee awards to clinical programs

may promote the availability of lower-cost representation, with salutary effects on the burden of fee awards, on statutory efforts to remove barriers to litigation of meritorious claims, and on the market forces encouraging settlement in appropriate cases, as well as on the quality of legal education.

Jordan v. United States Dep't of Justice, 691 F.2d 514, 524 (D.C. Cir. 1982). See also DiGennaro v. Bowen, 666 F. Supp. 426, 432 (E.D.N.Y. 1987) ("This court has acknowledged 'that students in a clinical program recognized by this circuit are entitled to an award in

appropriate circumstances'.")

Congress' intent in enacting § 1988 is clear -- fee awards should be calculated according to "market rates" for attorneys engaged in traditional, complicated federal litigation. In Blum v. Stenson, 465 U.S. 886, 893-96 (1984), this Court determined that nonprofit law firms and public interest legal organizations should not be treated differently for purposes of calculating fee awards. In Blum, this Court specifically rejected the contention of the U.S. Solicitor General that statutory fees should be calculated on an "actual cost" basis. Id. at 892-93, 895-96. Nor should these firms and organizations be penalized for their reliance on practices common in the traditional bar -- the use of, and

separate compensation for, legal support personnel.

The hourly rates for attorneys in public interest groups are to be measured against the "market" for traditional, for-profit law firms. The billing practices of public interest groups also should be measured by the legal profession's common billing practices, which include separate compensation for legal support personnel.

#### CONCLUSION

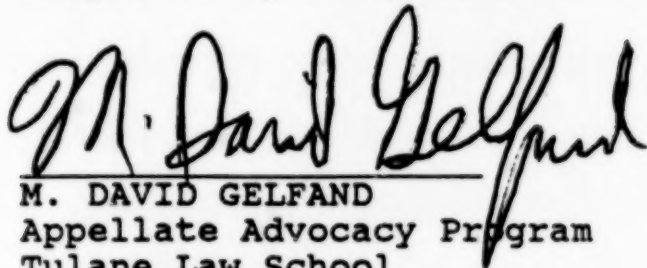
The panel's decision in the instant case is contrary to the mandates of this Court, is radically divergent from decisions of the other Courts of Appeals, and ill serves the public policy considerations underlying 42

U.S.C. § 1988. A contingency fee agreement should not automatically determine the level of fee that is reasonable under § 1988; rather, courts should apply the factors approved by Congress when it passed § 1988. Furthermore, separate compensation for legal support personnel is a traditional practice in the legal profession, maximizes the use of often-limited professional time, and reduces the cost of civil rights litigation.

For the above reasons, Amici, in support of Petitioner Blanchard, urge this Court to reverse the decision of the Fifth Circuit, and remand for

further proceedings consistent with this  
Court's instructions.

Respectfully submitted,



By: M. DAVID GELFAND  
Appellate Advocacy Program  
Tulane Law School  
6801 Freret Street  
New Orleans, LA 70118  
(504) 865-5995

Counsel of Record for Amici  
Curiae

TERRY E. ALLBRITTON, of Counsel

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